



STATE MINING AND GEOLOGY BOARD

Policy and Legislation Committee

Brian Baca, Chair; Erin Garner; Kathy Lund

EXECUTIVE OFFICER'S REPORT

For Meeting Date: May 12, 2011

Agenda Item No. 2: Language for Regulatory Due Process for the Placement of Mining Operations on, or Removal from, the AB 3098 List.

INTRODUCTION: The Department of Conservation, Office of Mine Reclamation (OMR) periodically publishes a list of mines regulated under the Surface Mining and Reclamation Act (SMARA) that meet provisions set forth under California's Public Resources Code (PRC), Section 2717(b). This list is generally referred to as the AB 3098 List, in reference to the 1992 legislation that established it. Sections 10295.5 and 20676 of the Public Contract Code preclude mining operations that are not on the AB 3098 List from selling sand, gravel, aggregates, or other mined materials, to state or local agencies. The need for a due process for the removal and reinstatement of a surface mining operation from the AB 3098 List has been recognized by the State Mining and Geology Board (SMGB). At its November 10, 2010, meeting, the Policy and Legislation Committee (Committee) considered preliminary regulatory concepts and directed its Executive Officer and legal counsel to provide a proposed regulation for the Committee's consideration for its December 9, 2010, meeting. Further discussions were held at the Committee's December 9, 2010, and January 13, February 10, and March 10, 2011, scheduled meetings. The Committee is considering proposed draft regulatory language.

STATUTORY AUTHORITY: Article 2, Approval of Contracts, of the Public Contract s Code, Section 10295.5 states:

"(a) Notwithstanding any other provision of law, no state agency shall acquire or utilize sand, gravel, aggregates, or other minerals produced from a surface mining operation subject to the Surface Mining and Reclamation Act of 1975 (Chapter 9 (commencing with Section 2710) of Division 2 of the Public Resources Code), unless the operation is identified in the list published pursuant to subdivision (b) of Section 2717 of the Public Resources Code as having either of the following:

(1) An approved reclamation plan and financial assurances covering the affected surface mining operation.

(2) An appeal pending before the State Mining and Geology Board pursuant to subdivision (e) of Section 2770 of the Public Resources Code with respect to the reclamation plan or financial assurances.

(b) The department shall revise its procedures and specifications for the acquisition of sand, gravel, aggregates, and other minerals to ensure maximum compliance with this section.



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(c) For purposes of this section, "minerals" means any naturally occurring chemical element or compound, or groups of elements and compounds, formed from inorganic processes and organic substances, including, but not limited to, coal, peat, and bituminous rock, but excluding geothermal resources, natural gas, and petroleum.

(d) The requirements of this section shall apply to mining operations on federal lands or Indian lands that are subject to the Surface Mining and Reclamation Act of 1975 (Chapter 9 (commencing with Section 2710) of Division 2 of the Public Resources Code) pursuant to a memorandum of understanding between the Department of Conservation and the federal agency having jurisdiction over the lands."

To assure compliance with the Public Contract Code, PRC Section 2717(b) states:

"For purposes of ensuring compliance with Sections 10295.5 and 20676 of the Public Contract Code, the department shall, at a minimum, quarterly publish in the California Regulatory Notice Register, or otherwise make available upon request to the Department of General Services or any other state or local agency, a list identifying all of the following:

(1) Surface mining operations for which a report has been submitted pursuant to Section 2207 that indicates all of following:

(A) The reclamation plan and the financial assurances have been approved pursuant to this chapter.

(B) Compliance with state reclamation standards developed pursuant to Section 2773.

(C) Compliance with the financial assurance guidelines developed pursuant to Section 2773.1.

(D) The annual reporting fee has been submitted to the Department of Conservation.

(2) Surface mining operations for which an appeal is pending before the board pursuant to subdivision (e) of Section 2770, provided that the appeal shall not have been pending before the board for more than 180 days.

(3) Surface mining operations for which an inspection is required and for which an inspection notice has been submitted by the lead agency pursuant to Section 2774 that indicates both compliance with the approved reclamation plan and that sufficient financial assurances, pursuant to Section 2773.1, have been approved and secured."

BACKGROUND: OMR periodically publishes a list of mines regulated under SMARA that meet provisions set forth under California's Public Resources Code, Section 2717(b). This list is generally referred to as the AB 3098 List, in reference to the 1992 legislation that established it. Sections 10295.5 and 20676 of the Public Contract Code preclude mining operations that are not on the AB 3098 List from selling sand, gravel, aggregates, or other mined materials, to state or local agencies.



Placement of a surface mining operation on the AB 3098 List: For OMR to place a mining operation on the AB 3098 List, the operation must meet all of the following conditions:

- The operation must have an approved reclamation plan;
- The operation must have an approved financial assurance;
- The operation must have filed its annual report;
- The operation must have paid its reporting fee;
- The operation must have had its annual inspection by the lead agency which reflects the operation is in full compliance with the law.

The operation may remain on the AB 3098 List if it has a pending appeal with the SMGB regarding its reclamation plan or financial assurance, provided its appeal has not been pending for more than 180 days.

The AB 3098 List is updated frequently, but no less often than quarterly. Surface mines can become eligible between publications of this list. If an operator of a surface mining operation has been excluded from this list inappropriately, the operator is advised to contact OMR.

Removal of a Surface Mining Operation from the AB 3098 List: Procedures for a surface mining operation that was on the AB 3098 List, but since removed, are less clear to the mining industry and general public, and have recently been questioned. Various stakeholders have expressed the need for:

- Written criteria and procedures for removing a mine from the AB 3098 List;
- Written requirements to provide notice and a hearing to affected mine operators prior to being removed from the AB 3098 List;
- Written procedures for a process appealing a delisting decision to the Board;
- Written standard pursuant to which a mining operation may be added back to the AB 3098 List; and
- Interim policies to allow operators to appeal removal or reinstatement to the SMGB to avoid operators being impacted by the lack of procedural safeguards.

In addition, a site may have been removed from the AB 3098 List for non-compliance issues. The operator may have subsequently taken all reasonable steps to address the site specific issues, but have not essentially resolve such issues because the administrative process could take several weeks to months to accomplish this objective. Under this situation, the site could

remain off the AB 3098 List, which can result in significant adverse economic impact on the surface mining operation, and existing contracts between the operator and their clients.

Previous Discussions: At its February 11, 2010, regular business meeting, the SMGB heard from OMR as to their procedures for removal of a surface mining operation from the AB 3098 List, and re-instatement. Following testimony, the SMGB directed this matter to the Policy and Legislation Committee (Committee) for further discussion and to consider recommendations to the whole SMGB, which may include proposed regulatory language outlining the administrative process for removal and reinstatement of a surface mining operation from the AB 3098 List.

At its July 8, 2010, regular business meeting, Chairman Pro Tem Baca directed the Executive Officer to prepared draft regulatory language to address due process should OMR not be in a position to provide such language. At its September 9, 2010, regular business meeting, OMR indicated that it would provide information for the Committee's consideration at its meeting scheduled for October 14, 2010.

At its October 10, 2010, meeting the Committee heard from Greg Tenorio, legal counsel with the Department of Conservation, discussed some of the areas that would require careful consideration, and committed to developing a flow diagram illustrating the conceptual due process for the Committee's November 10, 2010, meeting.

At its November 9, 2010, the Committee considered preliminary regulatory concepts set forth by the SMGB's legal counsel, and directed its Executive Officer and legal counsel to provide a proposed regulation for the Committee's consideration. Further discussions were held at the Committee's December 9, 2010, and January 13, February 10 and March 10, 2011, scheduled meetings.

The Committee is considering directing draft proposed regulatory language to a workshop venue for further discussion among the SMGB's stakeholders, prior to recommending acceptance by the whole SMGB.

EXECUTIVE OFFICER'S RECOMMENDATIONS: The revised proposed language would allow for a due process available to surface mining operations when OMR considers whether such operations qualify for removal and placement on, or re-placement on, the AB 3098 List.

The revised proposed draft language is for the Committee's discussion and consideration, and no recommendations are offered at this time.

Respectfully submitted:

Stephen M. Testa
Executive Officer